

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAUL GURROLA)	
Claimant)	
)	
VS.)	
)	
AM PLUMBING)	
Respondent)	Docket No. 1,026,282
)	
AND)	
)	
EMPLOYERS MUTUAL CASUALTY CO.)	
Insurance Carrier)	

ORDER

Respondent requested review of the February 12, 2007 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on May 18, 2007 in Wichita, Kansas.

APPEARANCES

James R. Roth, of Wichita, Kansas, appeared for the claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that the single issue for determination in this appeal is the nature and extent of claimant's functional impairment.

ISSUES

The ALJ awarded the claimant an 11 percent whole body functional impairment as a result of the December 17, 2004 accident. Based upon the language in the Award, this appears to be an average of the ratings offered by Dr. Murati (17 percent) and Dr. Eyster (5 percent).¹ The respondent requests review of this Award and suggests the ALJ erred in failing to adopt or consider the opinions of the independent medical examiner, Dr. Stein, who found the claimant did not sustain any additional permanent impairment as a result of his injury. Alternatively, the respondent suggests the Board adopt the permanent partial impairment opinions of Dr. Eyster, the treating physician, as a more credible source of medical opinions and to disregard those expressed by Dr. Murati.

Claimant argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ set forth the facts and circumstances involved in claimant's accident and his subsequent treatment for his injury. The Board adopts that factual statement as its own and will only repeat those facts necessary to explain the Board's findings.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."³

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁴

¹ ALJ Award (Feb. 12, 2007) at 4.

² K.S.A. 44-501(a).

³ K.S.A. 2004 Supp. 44-508(g).

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

In this instance, Dr. Stein, the independent medical examiner, appointed by the ALJ concluded that claimant had suffered no additional impairment after the injury at issue in this claim and remained in category II of the DRE's, contained within the *Guides*.⁵ However, Dr. Stein further indicated that if claimant suffered from radiculopathy, claimant would be entitled to an additional 5 percent whole person impairment.⁶ In order to confirm the radiculopathy, he recommended an EMG/NCT of both lower extremities. Unfortunately, that test was not done.

Dr. Eyster, the treating physician, also rated claimant as having a 5 percent preexisting whole person impairment attributable to the 2004 accident along with another 5 percent attributable to the new injury. At his lawyer's request claimant was also examined by Dr. Murati who testified that claimant's impairment worsened by 17 percent as a result of his 2004 accident.

Both Dr. Eyster and Dr. Murati concluded claimant's complaints of leg pain met the criterial for radiculopathy under the provisions of the *Guides*. And even Dr. Stein conceded that if the diagnostic tests he recommended documented nerve damage, that he believed claimant was entitled to an additional 5 percent impairment.

After considering all of the medical testimony from each of the physicians, the Board finds the Award should be modified to reflect a 5 percent impairment. The greater weight of the evidence supports such a finding given Dr. Eyster and Dr. Stein's opinions and claimant's consistent complaints of radicular pain.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. The Board therefore approves the fee agreement on file.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated February 12, 2007, is modified to award claimant a 5 percent permanent partial impairment to the whole body.

The claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of \$351.69 per week or \$7,297.57 for a 5 percent permanent partial impairment, making a total award of \$7,297.57.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁶ R.H. Trans., Resp. Ex. 1 at 6 (Dr. Stein's May 31, 2006 IME Report).

As of June 13, 2007 there would be due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of \$351.69 per week in the sum of \$7,297.57 for a total due and owing of \$7,297.57, which is ordered paid in one lump sum less amounts previously paid.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of June, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Roth, Attorney for Claimant
Dallas L. Rakestraw, Attorneys for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge